

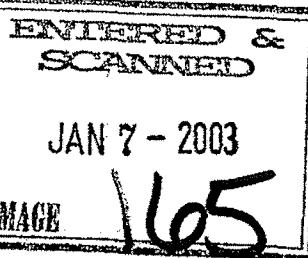
THE STATE OF OHIO, HAMILTON COUNTY

COURT OF COMMON PLEAS

CRIMINAL DIVISION

STATE OF OHIO

NO. B-939022



Plaintiff-Respondent :

vs. :

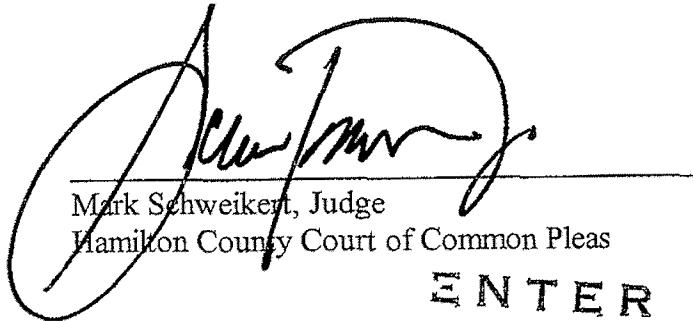
JAMES DERRICK O'NEAL :

ENTRY GRANTING ADDITIONAL  
TIME TO FILE RESPONSE UNTIL  
FEBRUARY 3, 2003

Defendant-Petitioner :

This cause came to be considered upon the motion of Plaintiff-Respondent, State of Ohio, herein for an extension of time to file the Response of Plaintiff-Respondent and, the Court, upon consideration thereof, finds the motion is well taken and is granted.

Wherefore, it is the Order of this Court that the Plaintiff-Respondent has until February 3, 2003, to file said response.

  
\_\_\_\_\_  
Mark Schweikert, Judge  
Hamilton County Court of Common Pleas  
ENTER  
JAN - 7 2003  
MARK R SCHWEIKERT

## THE STATE OF OHIO, HAMILTON COUNTY

## COURT OF COMMON PLEAS

## CRIMINAL DIVISION

STATE OF OHIO

NO. B-939022

Plaintiff-Respondent

(Judge Schweikert)

vs.

**MOTION TO EXTEND TIME TO  
FILE A RESPONSE TO  
DEFENDANT'S SUCCESSIVE  
PETITION TO VACATE**

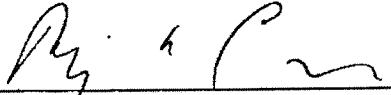
JAMES DERRICK O'NEAL

Defendant-Petitioner

Now comes the State of Ohio, plaintiff-respondent, in the above entitled matter, and does hereby request a continuance until February 17, 2003, to file a response to defendant-petitioner's successive petition to vacate, which was filed on November 15, 2002, for the reason that counsel for the plaintiff-respondent has an extensive workload.

FEB 3 3 07 PM '03  
JAMES DERRICK  
CLERK OF COURT  
HAMILTON COUNTY

FILED

  
Philip R. Cummings, 0041497P  
Assistant Prosecuting Attorney  
230 East Ninth Street, Suite 4000  
Cincinnati, Ohio 45202  
513/946-3012

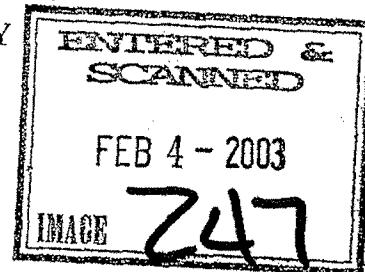
CERTIFICATION

I hereby certify on this 3rd day of February, 2003, I have posted a copy of the above entitled document to counsel for the defendant by posting same in the United States mail addressed to John J. Gideon (0008151), Attorney at Law, 1093 South Fourth Street, Columbus, Ohio 43206-2621, and Michael W. Krumholtz (0009099), Attorney at Law, Bieser, Greer & Landis, LLP, 6 North Main Street, Suite 400, Dayton, Ohio 45402-1908.

  
Philip R. Cummings, 0041497P  
Assistant Prosecuting Attorney



THE STATE OF OHIO, HAMILTON COUNTY  
COURT OF COMMON PLEAS  
CRIMINAL DIVISION

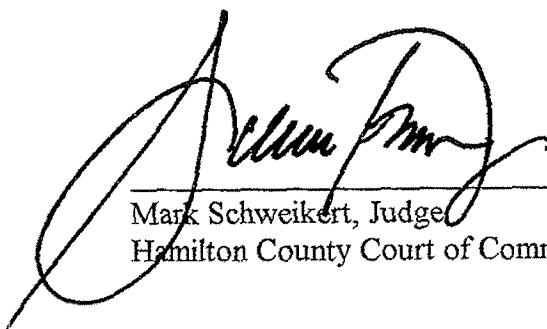


STATE OF OHIO : NO. B-939022

Plaintiff-Respondent :  
vs. : ENTRY GRANTING ADDITIONAL  
TIME TO FILE RESPONSE UNTIL  
FEBRUARY 17, 2003  
JAMES DERRICK O'NEAL :  
Defendant-Petitioner :

This cause came to be considered upon the motion of Plaintiff-Respondent, State of Ohio, herein for an extension of time to file the Response of Plaintiff-Respondent and, the Court, upon consideration thereof, finds the motion is well taken and is granted.

Wherefore, it is the Order of this Court that the Plaintiff-Respondent has until February 17, 2003, to file said response.

  
Mark R. Schweikert, Judge  
Hamilton County Court of Common Pleas

ENTER  
FEB 03 2003  
MARK R SCHWEIKERT

THE STATE OF OHIO, HAMILTON COUNTY  
 COURT OF COMMON PLEAS

## CRIMINAL DIVISION

STATE OF OHIO

NO. B-939022

Plaintiff-Respondent (Judge Schweikert)

vs.

**MOTION TO EXTEND TIME TO  
 FILE A RESPONSE TO  
 DEFENDANT'S SUCCESSIVE  
 PETITION TO VACATE**

JAMES DERRICK O'NEAL

Defendant-Petitioner

Now comes the State of Ohio, plaintiff-respondent, in the above entitled matter, and does hereby request a continuance until March 21, 2003, to file a response to defendant-petitioner's successive petition to vacate, which was filed on November 15, 2002, for the reason that counsel for the plaintiff-respondent has an extensive workload.

**FILED**

Criminal Division

MAR 03 2003

HAMILTON COUNTY  
 GREGORY HARTMANN  
 CLERK OF COURTS

**FILED**

3 24 PM '03

*R. Cummings*  
 Philip R. Cummings, 0041497P  
 Assistant Prosecuting Attorney  
 230 East Ninth Street, Suite 4000  
 Cincinnati, Ohio 45202  
 513/946-3012

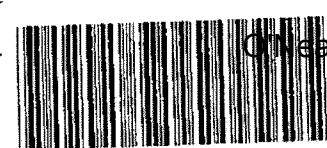
**CERTIFICATION**

Hereby certify on this 3 day of March, 2003, I have posted a copy of the above entitled document to counsel for the defendant by posting same in the United States mail addressed to John J. Gideon (0008151), Attorney at Law, 1093 South Fourth Street, Columbus, Ohio 43206-2621, and Michael W. Krumholtz (0009099), Attorney at Law, Bieser, Greer & Landis, LLP, 6 North Main Street, Suite 400, Dayton, Ohio 45402-1908.

*R. Cummings*  
 Philip R. Cummings, 0041497P

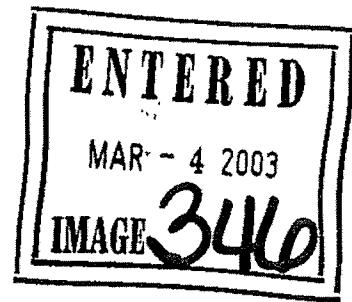
Assistant Prosecuting Attorney

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 Page 28



D53720270

THE STATE OF OHIO, HAMILTON COUNTY  
COURT OF COMMON PLEAS  
CRIMINAL DIVISION



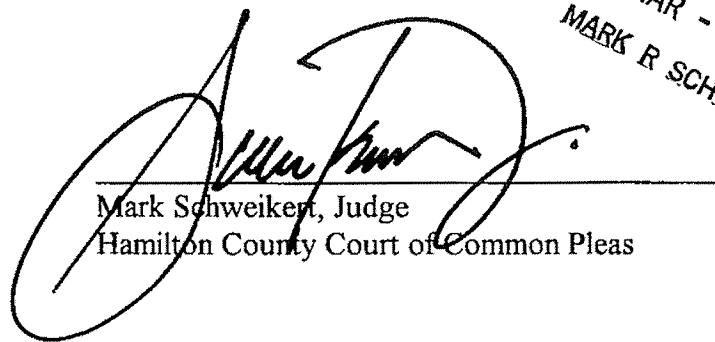
STATE OF OHIO : NO. B-939022

Plaintiff-Respondent :  
vs.  
JAMES DERRICK O'NEAL : ENTRY GRANTING ADDITIONAL  
TIME TO FILE RESPONSE UNTIL  
March 21, 2003

Defendant-Petitioner :

This cause came to be considered upon the motion of Plaintiff-Respondent, State of Ohio, herein for an extension of time to file the Response of Plaintiff-Respondent and, the Court, upon consideration thereof, finds the motion is well taken and is granted.

Wherefore, it is the Order of this Court that the Plaintiff-Respondent has until March 21, 2003, to file said response.

  
Mark R. Schweikert, Judge  
Hamilton County Court of Common Pleas

ENTERED  
MAR - 3 2003  
MARK R. SCHWEIKERT



THE STATE OF OHIO, HAMILTON COUNTY

COURT OF COMMON PLEAS

CRIMINAL DIVISION

STATE OF OHIO

NO. B-939022

Plaintiff-Respondent

(Judge Schweikert)

vs.

JAMES DERRICK O'NEAL

**MOTION TO EXTEND TIME TO  
FILE A RESPONSE TO  
DEFENDANT'S SUCCESSIVE  
PETITION TO VACATE**

Defendant-Petitioner

Now comes the State of Ohio, plaintiff-respondent, in the above entitled matter, and does  
hereby request a continuance until May 21, 2003, to file a response to defendant-petitioner's  
successive petition to vacate, which was filed on November 15, 2002, for the reason that counsel for  
the plaintiff-respondent has an extensive workload.

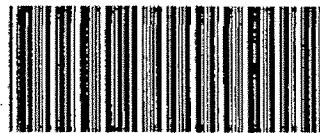
GREER & LANDIS  
CLERK OF COURT  
HAMILTON COUNTY  
2003 APR 24

Phil Cummings /per JMK  
Philip R. Cummings, 0041497P  
Assistant Prosecuting Attorney  
230 East Ninth Street, Suite 4000  
Cincinnati, Ohio 45202  
513/946-3012

CERTIFICATION

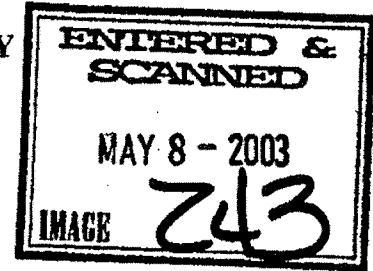
I hereby certify on this 24 day of April, 2003, I have posted a copy of the above entitled  
document to counsel for the defendant by posting same in the United States mail addressed to John  
J. Gideon (0008151), Attorney at Law, 1093 South Fourth Street, Columbus, Ohio 43206-2621, and  
Michael W. Krumholtz (0009099), Attorney at Law, Bieser, Greer & Landis, LLP, 6 North Main  
Street, Suite 400, Dayton, Ohio 45402-1908.

Phil Cummings /per JMK  
Philip R. Cummings, 0041497P  
Assistant Prosecuting Attorney



D54396509

THE STATE OF OHIO, HAMILTON COUNTY  
COURT OF COMMON PLEAS  
CRIMINAL DIVISION

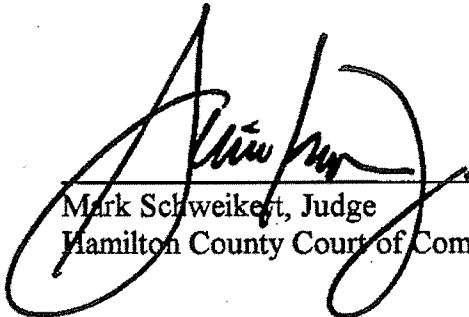


STATE OF OHIO : NO. B-939022

Plaintiff-Respondent :  
vs.  
JAMES DERRICK O'NEAL : ENTRY GRANTING ADDITIONAL  
TIME TO FILE RESPONSE UNTIL  
MAY 21, 2003  
Defendant-Petitioner :

This cause came to be considered upon the motion of Plaintiff-Respondent, State of Ohio, herein for an extension of time to file the Response of Plaintiff-Respondent and, the Court, upon consideration thereof, finds the motion is well taken and is granted.

Wherefore, it is the Order of this Court that the Plaintiff-Respondent has until May 21, 2003, to file said response.

  
Mark Schweikert, Judge  
Hamilton County Court of Common Pleas  
ENTER  
MAY - 8 2003  
MARK R SCHWEIKERT

THE STATE OF OHIO, HAMILTON COUNTY

COURT OF COMMON PLEAS

CRIMINAL DIVISION

STATE OF OHIO

Plaintiff-Respondent

vs.

JAMES DERRICK O'NEAL

Defendant-Petitioner

Now comes the State of Ohio, plaintiff herein, and moves this Court to accept the State's response instanter.

NO. B-939022

Judge Ralph Winkler

MOTION TO ACCEPT RESPONSE  
OF PLAINTIFF INSTANTER

Respectfully submitted,

  
Philip R. Cummings, 0041497P  
Assistant Prosecuting Attorney  
230 East Ninth Street, Suite 4000  
Cincinnati, Ohio 45202  
513/946-3012

CERTIFICATION

I hereby certify that a copy of this document was served upon John J. Gideon, Attorney at Law, 1093 South Fourth Street, Columbus, Ohio 43206-2621, and Michael W. Krumholtz, Attorney at Law, Bieser, Greer & Landis, LLP, 6 North Main Street, Suite 400, Dayton, Ohio 45402-1908 by ordinary United States mail on the 3 day of June, 2003.

  
Philip R. Cummings, 0041497P  
Assistant Prosecuting Attorney



D54858706

IN THE COURT OF COMMON PLEAS  
HAMILTON COUNTY, OHIO  
CRIMINAL DIVISION

GREGORY KARTMANN  
CLERK OF COURTS  
HAMILTON COUNTY, OH

STATE OF OHIO

2003 JUN -3 P 2:29

Plaintiff

NO. B-939022

Judge *Ralph Winkler*

FILED

vs.

JAMES DERRICK O'NEAL

MEMORANDUM IN OPPOSITION TO  
FIRST SUCCESSIVE PETITION TO  
VACATE JUDGMENT OR SENTENCE

Defendant

I. Procedural Posture

In 1995, this Court sentenced O'Neal to death for the brutal slaying of Carol O'Neal. The Ohio Supreme Court affirmed the judgment and the United States Supreme Court denied O'Neal's petition for Writ of Certiorari on May 21, 2001.

This Court denied O'Neal's initial post-conviction petition on February 17, 1998. This judgment was ultimately affirmed by the First District Court of Appeals. The Ohio Supreme Court denied jurisdiction on March 8, 2000. O'Neal's petition for a writ of habeas corpus is presently pending in Federal Court.<sup>1</sup>

On November 15, 2002, O'Neal filed his First Successive Petition to Vacate or Set Aside Sentence based upon the United States Supreme Court's recent decision in Atkins v. Virginia (2002) 122 S.C.T. 2242.

In Atkins, the Court held that executions of the mentally retarded were cruel and unusual punishment prohibited by the Eighth Amendment. O'Neal is now claiming he is mentally retarded.

<sup>1</sup> O'Neal v. Bagley, Warden, Case No. C-1-2-357.



D54858694

O'Neal's petition is properly denied as he has failed to produce any evidence that he meets the current standard for mental retardation.

II. Law

The Supreme Court of the United States has ruled that the execution of the mentally retarded violates the Eighth Amendment's ban on cruel and unusual punishment. Atkins v. Virginia (supra).

Although Atkins barred the execution of the mentally retarded, it did not establish procedures for determining whether an individual is "mentally retarded" for purposes of escaping execution.

In State v. Lott,<sup>2</sup> the Ohio Supreme Court set forth the standards and procedural guidelines for determining whether convicted petitioners facing the death penalty are mentally retarded.

Clinical definitions of mental retardation provide a standard for evaluating an individuals' claim of mental retardation. These definitions require (1) significantly sub-average intellectual functioning; (2) significant limitations in two or more adaptive skills, such as communication, self-care, and self-direction; and (3) onset before the age of 18. There is a rebuttable presumption that a petitioner is not mentally retarded if his or her IQ is above 70.

State v. Lott (supra).

The procedures for post-conviction relief outlined in R.C. 2929.2953.21 et seq. provide a suitable statutory framework for reviewing an Atkins claim. Lott (supra). If a trial court grants a petitioner a hearing on his post-conviction Atkins claim, the petitioner will bear the burden of establishing that he is mentally retarded by a preponderance of the evidence. Lott (supra).

However, before a petitioner is entitled to a hearing on an Atkins claim (or any other claim), he

---

<sup>2</sup> 97 Ohio St. 3d 303; 2002 Ohio 6625; 779 N.E.2d 1011; 2002 Ohio LEXIX 3026.

must first plead specific facts and provide cognizable documentation to support the claim. State v. Perry (1967), 10 Ohio St.2d 175, 226 N.E.2d 104. The documentation provided must meet at least a minimum level of cogency to be recognized by the court. State v. Combs (1994), 100 Ohio App.3d 90. When considering whether to grant a hearing under REVISED CODE 2953.21, the trial court must consider the petition, supporting affidavits, and files and records such as the indictment, journal entries, clerk's records and transcripts of proceedings. (See R.C. 2953.21(C)) The material submitted must be sufficient to demonstrate substantive grounds for relief. See State v. Pankey, 68 OS2d 59, 428 N.E.2d 413. Here, O'Neal's petition is properly denied without a hearing because he has failed to attach documentation demonstrating that he is retarded or otherwise indicating substantive grounds for relief.

### III. O'Neal Is Not Retarded

It is apparent, on the face of O'Neal's pleadings, that his claim of mental retardation is meritless. (The Ohio Supreme Court noted in its decision that O'Neal is not mentally retarded.)

First, O'Neal attaches no documentation to his petition to support his claims. Without such, his petition is subject to denial without a hearing. See State v. Pankey (supra).

Secondly, this Court's review of the trial record will reveal that O'Neal cannot meet the standard for mental retardation set forth in Lott (supra). Dr. Chiappone specifically testified at trial that O'Neal is not retarded. [Tp. 981] At worst, O'Neal borders on mild retardation. [Tp. 981, 992]. He actually functions on a much higher level than his attained IQ. [Tp. 992, 1004]

Third, O'Neal's life history before the murder indicates that he was not significantly limited in the areas of communication, self-care or self-direction.

O'Neal's mother described him as a "normal kid." [Tp. 918] O'Neal was never in special classes in school. [Tp. 977] He fought for and obtained custody of his children. [Tp. 921-925] He worked to provide for his family and did so. He worked at Aerotek for four consecutive years.<sup>3</sup> He worked at Kenwood Country Club where he earned a reputation as a fabulous worker with a strong work ethic. [Tp. 959] He was known as a peacemaker. {Tp. 940, 961] Indeed, his supervisor at the Kenwood Country Club testified:

Jamie Powers: ". . . I observed James, at least on three occasions that are clear, that he kind of stepped in the middle as a peacemaker and separated a couple guys that were going at it. So I have tremendous faith in our relationship.

Q. You would have rehired him after December 2<sup>nd</sup>?

A. I'd rehire him today if I was in that position. . . .  
[Tp. 961]

After returning home from prison after some drug problems, O'Neal dedicated himself to turning his life around. His childhood friend testified:

Prosecutor Q. And did you notice any changes in James after he got out?

A. A 360 degree turn.

Q. And what do you mean by that?

A. From the things that he used to do he didn't do anymore, as far as hustling and selling drugs and running the streets. That wasn't a part of him anymore.

Q. He wasn't running the streets then?

A. No.

Q. And can you tell us, did he get employed?

---

<sup>3</sup> O'Neal was Aerotek's employee of the month in January 1991. [Tp. 923]

A. He had hard times from time to time until he landed - I think his significant first job was the Aerotek job.

Q. And did you ever see him go back to running the streets?

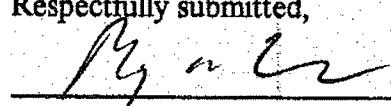
A. No, I didn't. . .

[Tp. 934]

In sum, O'Neal is not mentally retarded. He may suffer from a personality disorder and be prone to substance abuse, but he is not mentally retarded under the Lott standard. His history indicates that he was a man quite capable of positive communication, self-care and self-direction. When he chose to do so, O'Neal worked hard, provided for his family, avoided drugs and earned a reputation as a desirable employee. This is not the list of accomplishments of a man with significant limits on intellectual functioning or self-direction.

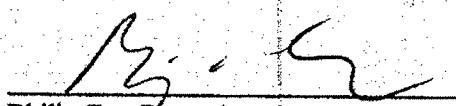
From the trial record itself, it is clear that O'Neal's Atkins claim is meritless and his petition is properly denied without a hearing.

Respectfully submitted,

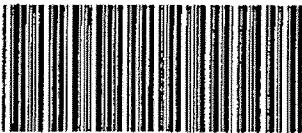
  
Philip R. Cummings, 0041497P  
Assistant Prosecuting Attorney  
230 East Ninth Street, Suite 4000  
Cincinnati, Ohio 45202  
513/946-3012

CERTIFICATE OF SERVICE

I hereby certify on this 3 day of June, 2003, I have posted a copy of the above entitled document to counsel for the defendant by posting same in the United States mail addressed to John J. Gideon (0008151), Attorney at Law, 1093 South Fourth Street, Columbus, Ohio 43206-2621, and Michael W. Krumholz (0009099), Attorney at Law, Bieser, Greer & Landis, LLP, 6 North Main Street, Suite 400, Dayton, Ohio 45402-1908.

  
Philip R. Cummings, 0041497P  
Assistant Prosecuting Attorney

O'Neal Apx. Vol. VIII  
Page 37



D54933989

IN THE COURT OF COMMON PLEASE  
HAMILTON COUNTY, OHIO  
CRIMINAL DIVISION

STATE OF OHIO,

Case No. B-939022

Plaintiff/Respondent,

(JUDGE SCHWEIKERT)

vs.

Death Penalty Case

2003 JUN 10 12:57 10 JAMES DERRICK O'NEAL

Defendant/Petitioner.

DEFENDANT-PETITIONER'S REPLY MEMORANDUM  
IN RESPONSE TO THE PLAINTIFF'S MEMORANDUM IN OPPOSITION

MEMORANDUM

This matter is before the Court on the Defendant's First Successive Petition to Vacate or Set Aside Sentence which was filed in the wake of the United States Supreme Court's decision in Atkins v. Virginia, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), and the decision of the Ohio Supreme Court in State v. Lott, 97 Ohio St.3d 303, 2002 Ohio 6625. Atkins articulated the determination that the execution of mentally retarded individuals violates the Eighth Amendment's ban on cruel and unusual punishment. Atkins v. Virginia, 122 S. Ct. at 2252. The Ohio Supreme Court responded to Atkins by setting forth the standards and procedural guidelines for determining whether convicted O'Neal Apx. Vol. VIII

petitioners facing the death penalty are mentally retarded. State v. Lott, 97 Ohio St.3d at 305.

The Defendant has requested a hearing on the issue of whether or not he is mentally retarded. In its response, the State argues that the Defendant is not entitled to a hearing in that he has failed to "first plead specific facts and provide cognizable documentation to support the claim". Memorandum in Opposition at pp. 2-3. Relying on the 1967 decision of the Ohio Supreme Court in State v. Perry and the 1981 decision of the Ohio Supreme Court in State v. Pankey the State claims that there has been an insufficient submission of material to demonstrate the substantive grounds for relief and the appropriateness of a hearing. Id. at 3.

Importantly, State v. Perry and State v. Pankey are cases decided long before the recent decision of the United States Supreme Court in Atkins and the decision of the Ohio Supreme Court that followed in State v. Lott. It is State v. Lott that sets forth the procedure that this Court must employ in dealing with the claim of mental retardation.

State v. Lott held that: "Whether Lott is mentally retarded is a disputed factual issue, which we believe is best resolved in the trial court. The defense should have the opportunity to present additional evidence on Lott's mental retardation before a final decision is made". State v. Lott, 97 Ohio St.3d at 304. Accordingly, the Supreme Court of Ohio, following the United States Supreme Court's decision in Atkins, will not permit the resolution of this constitutional issue based on some claim of technical insufficiency in the pleadings without the defendant having received the opportunity to present evidence on the mental retardation claim.

Moreover, Lott stands for the proposition that "the trial court shall conduct its own de novo review of the evidence in determining whether the defendant is mentally

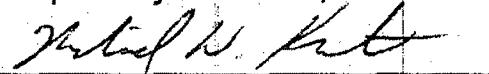
retarded. The trial court should rely on professional evaluations of Lott's mental status, and consider expert testimony, appointing experts if necessary, in deciding this matter". Id. at 306. In this case, the Defendant has asked the Court to permit his hiring of an expert at court expense. First Successive Petition to Vacate or Set Aside Judgment at p. 7 #5.

In fact, the Petition to Vacate or Set Aside Judgment is replete with references to the record which establish the need for a hearing to determine whether or not James Derrick O'Neal is mentally retarded and, accordingly, subject to the death penalty. The Petition cites not only the testimony of Dr. David Chiappone (also cited in part by the State), but also the testimony of Dr. Robert Tureen, a clinical neuropsychologist (Dr. Tureen's testimony is not referenced in the State's Memorandum). Both Dr. Chiappone - a psychologist - and Dr. Tureen - a neuropsychologist to whom Dr. Chiappone referred Petitioner for further, specialized examinations and testing - testified at trial that Petitioner is borderline mentally retarded and that he has a lack of coping skills and limitations on his ability to function. In addition, Dr. Tureen testified that testing of Petitioner showed "minimal cerebral dysfunction".

Interestingly, in filing its tardy response to the Petition (through a series of Motions to Extend Time to File a Response) the State had obtained an extension of the deadline until May 21, 2003 and seeks the acceptance of their present filing "instanter" the State's use of the Perry case is remarkably similar to the State's response in Lott. Id. at 306. In Lott the State argued that res judicata barred Lott's claim referencing State v. Perry. Id. The Ohio Supreme Court specifically rejected that argument noting that "Lott lacked the opportunity to fully litigate his mental retardation claim" and that "res judicata does not bar Lott's claim of mental retardation". Id.

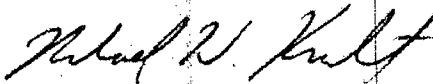
For these reasons, the request of the Defendant/Petitioner for a hearing on his First Successive Petition to Vacate or Set Aside Judgment should be sustained. The Court should grant the relief requested in the Petition so that discovery can be conducted, an expert can be utilized on behalf of the Defendant and a hearing held.

Respectfully submitted,



*for*  
JOHN J. GIDEON (0008151)  
(Trial Attorney)  
1093 South Fourth Street  
Columbus, Ohio 43206-2621  
Phone: (614) 444-9906  
Facsimile: (614) 444-1885

and



MICHAEL W. KRUMHOLTZ (0009099)  
(Co-Counsel)  
Bieser, Greer & Landis LLP  
6 North Main Street, Suite 400  
Dayton, Ohio 45402-1908  
Phone: (937) 223-3277  
Facsimile: (937) 223-6339

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing was mailed to Phillip R. Cummings, Assistant Prosecuting Attorney, Hamilton County Prosecutor's Office, 230 E. Ninth Street, Suite 4000, Cincinnati, OH 45202 by regular U.S. Mail on this 10th day of June, 2003.



Counsel for James Derrick O'Neal

8728.202206 \ 214460.1

BIESER, GREER & LANDIS  
ATTORNEYS AT LAW  
400 NATIONAL CITY CENTER  
6 NORTH MAIN STREET  
DAYTON, OHIO 45402  
(937) 223-3277

O'Neal Apx. Vol. VIII  
Page 41

THE STATE OF OHIO, HAMILTON COUNTY

COURT OF COMMON PLEAS

CRIMINAL DIVISION

STATE OF OHIO

NO. B-939022

Plaintiff-Respondent : (Judge Schweikert)

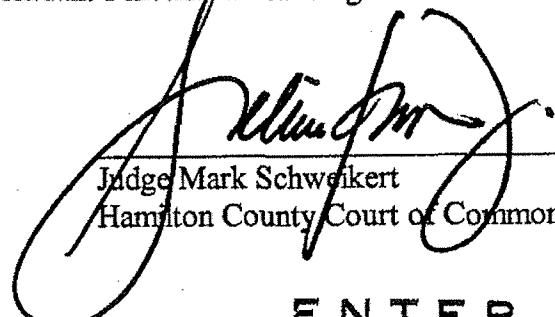
vs.

ENTRY OVERRULING MOTION  
FOR FUNDING MENTAL  
RETARDATION EXPERT AND  
DISCOVERY

JAMES DERRICK O'NEAL

Defendant-Petitioner

The Court hereby overrules defendant's motion for funding a mental retardation expert, and for additional discovery.

  
Judge Mark Schweikert  
Hamilton County Court of Common Pleas

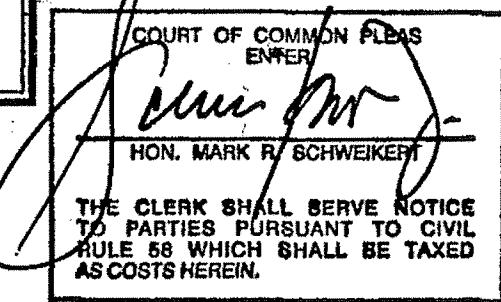
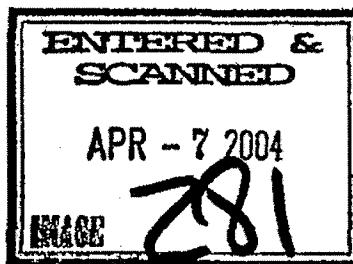
Counsel:

Philip R. Cummings (0041497P)  
Assistant Prosecuting Attorney  
230 E. Ninth Street, Suite 4000  
Cincinnati, Ohio 45202  
(513) 946-3012

John J. Gideon (0008151)  
(Trial Attorney)  
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**THE STATE OF OHIO, HAMILTON COUNTY**  
**COURT OF COMMON PLEAS**  
**CRIMINAL DIVISION**

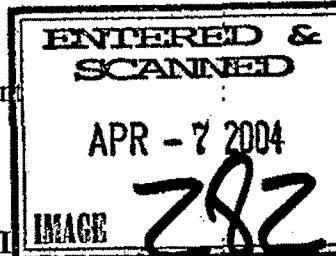
**STATE OF OHIO**

Plaintiff-Respondent

vs.

**JAMES DERRICK O'NEAL**

Defendant-Petitioner



O. B-939022

(Judge Schweikert)

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW, AND  
ENTRY DISMISSING SUCCESSIVE  
PETITION FILED PURSUANT TO  
ATKINS V. VIRGINIA**

This motion came before the Court on the petition to vacate or set aside judgment filed pursuant to Atkins v. Virginia<sup>1</sup> and State v. Lott<sup>2</sup>. The Court has reviewed the entire record in this matter, including any and all evidence relating to O'Neal's mental status that was produced at pre-trial, trial, at the mitigation hearing, and submitted with his Atkins petition. The Court has also reviewed the State of Ohio's Memorandum in Opposition to the Petition, and O'Neal's Reply Memorandum.

Based upon the above, the Court makes the following Findings of Fact:

James O'Neal was indicted on December 16, 1993, by a Hamilton County Grand Jury. The indictment charged O'Neal as follows:

Count 1 of the indictment charged O'Neal with purposely causing the death of Carol O'Neal during the commission of an aggravated burglary (R.C. 2903.01(A)). Count 1 also carried two death

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<sup>1</sup> (2002), 122 S.Ct. 224

<sup>2</sup> (2002), 93 Ohio St.3d 303

penalty specifications: one alleged a course of conduct involving the purposeful attempt to kill two or more persons (R.C. 2929.04(A)(5)); and a second alleged murder during an aggravated burglary (R.C. 2929.04(A)(7)). Count 2 of the indictment charged O'Neal with purposely causing the death of Carol with prior calculation and design (R.C. 2903.01(B)). Count 2 also carried the same two death penalty specifications as count 1. O'Neal was also indicted on one count of attempted murder of Carol's son, Ricardo, (count 3) and one count of aggravated burglary (count 4). Each count in the indictment also carried a firearm specification.

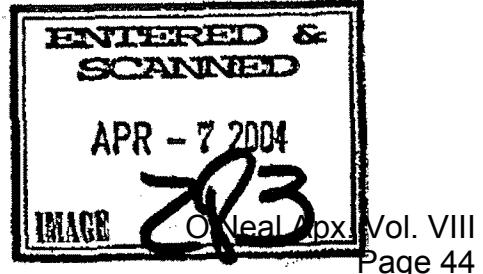
The jury found O'Neal guilty of both counts of aggravated murder (counts 1 and 2), both aggravated burglary death penalty specifications, three of the firearm specifications, and the aggravated burglary charge (count 4). The jury found O'Neal not guilty of attempted murder (count 3) and the course-of-conduct death penalty specifications.

Following a penalty hearing, the jury recommended that O'Neal be sentenced to death on both aggravated murder counts. This court conducted an independent review of the evidence pursuant to R.C. 2929.03(F) and accepted the jury's recommendation and imposed the sentence of death. For the aggravated burglary charge (count 4) and firearm specifications, O'Neal was sentenced in accordance with the law. On appeal, the court of appeals affirmed.

The Ohio Supreme Court affirmed the judgment and the United States Supreme Court denied O'Neal's petition for Writ of Certiorari on May 21, 2001.

This Court denied O'Neal's initial post-conviction petition on February 17, 1998. This judgment was ultimately affirmed by the First District Court of Appeals. The Ohio Supreme Court denied jurisdiction on March 8, 2000.

2.



On November 15, 2002, O'Neal filed his First Successive Petition to Vacate or Set Aside Sentence based upon the United States Supreme Court's decision in Atkins v. Virginia<sup>3</sup>.

O'Neal is represented in this petition by John J. Gideon and Michael W. Krumholtz. O'Neal's sole ground for relief is that he is mentally retarded and, therefore, can not be executed under the United State's Supreme Court's ruling in Atkins v. Virginia<sup>4</sup>.

In support of his petition, O'Neal has submitted no material, affidavits or documentation. O'Neal refers to the trial record to support his claim.

O'Neal cites to the mitigation phase testimony of Dr. David Chiappone, a clinical psychologist, to support his claim. O'Neal notes that Dr. Chiappone said O'Neal "scored in what are called the border range of mental retardation." (T.p. 981) Dr. Chiappone testified that O'Neal suffered from "borderline mental retardation based on the IQ test and substantiated by his educational data". (T.p. 987) The doctor testified that O'Neal lacked coping skills.

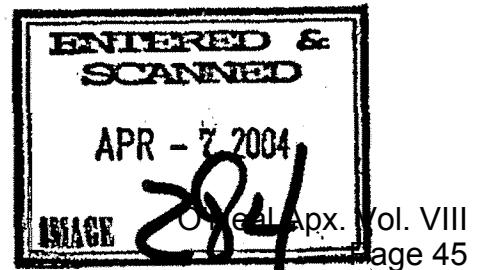
O'Neal also cites to the mitigation phase testimony of Dr. Robert Tureen, a clinical neuropsychologist. Dr. Tureen, O'Neal notes, testified that O'Neal had "minimal cerebral dysfunction" and functioned "in the borderline to mildly retarded range". (T.p. 1002) Dr. Tureen also testified that O'Neal has limitations and difficulties adjusting to and coping with the world.

This Court has thoroughly reviewed the testimony of Dr. Chiappone and Dr. Tureen. The Court finds that Dr. Chiappone specifically testified that O'Neal is not retarded. (T.p. 981, 992) Dr. Chiappone testified that O'Neal functions much higher than his attained IQ and when O'Neal wants to, he can work - and work well. The doctor noted that O'Neal's work record is a reflection of this.

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<sup>3</sup> (2002) 122 S.Ct. 2242

<sup>4</sup> *supra*



(T.p. 992) The Court finds that O'Neal worked at Aerotek for consecutive years earning "employee of the month" honors in January 1991. O'Neal also worked at the Kenwood County Club earning a reputation as a solid worker with a strong work ethic. (T.p. 959)

The Court finds Dr. Tureen's testimony consistent with these facts. Dr. Tureen testified that while O'Neal has a mild cerebral problem (T.p. 1001), O'Neal is capable of performing well in rote tasks. (T.p. 1004) Dr. Tureen noted that O'Neal is in the borderline range of mild mental retardation - in the 70-72 range. (T.p. 1009)

The Court finds that O'Neal worked various jobs in an effort to provide for his family and keep his family together. (T.p. 921-925, 934-935)

The Court finds that the Ohio Supreme Court specifically acknowledged that O'Neal (after years of selling drugs) attempted to turn his life around, become a responsible citizen and take custody of his children. The Ohio Supreme Court acknowledged that O'Neal encouraged his children to get an education and he attempted legitimate, steady employment after prison.

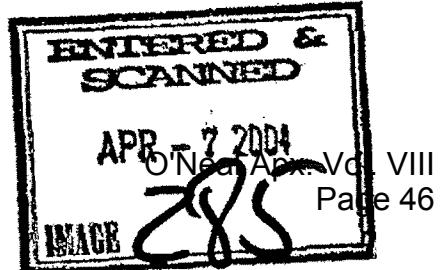
The Court finds that the Ohio Supreme Court specifically noted that O'Neal is not mentally retarded.

The Court finds that there is no evidence that O'Neal is unable to function or care for himself.

In State v. Lott<sup>5</sup>, the Ohio Supreme Court set forth the standards and procedural guidelines for determining whether convicted petitioners facing the death penalty are mentally retarded. Clinical definitions of mental retardation provide a standard for evaluating an individual's claim of mental retardation. These definitions require (1) significantly sub-average intellectual functioning;

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<sup>5</sup> 97 Ohio St.3d 303, 2002-Ohio-6625, 779 N.E.2d 1011



(2) significant limitations in two or more adaptive skills, such as communication, self-care, and self-direction; and (3) onset before the age of 18. There is a rebuttable presumption that a defendant is not mentally retarded if his or her IQ is above 70.

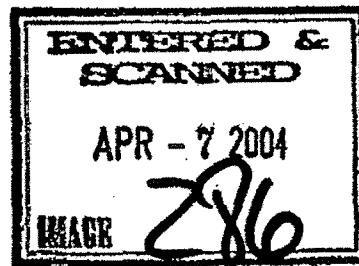
Based upon the above findings of fact and standard of law, the Court makes the following Conclusions of Law:

- (1) There is a rebuttable presumption that James O'Neal is not mentally retarded;
- (2) James O'Neal does not suffer from significantly sub-average intellectual functioning;
- (3) James O'Neal does not suffer from significant limitations with respect to his adaptive skills, such as communication, self-care and self-direction.
- (4) James O'Neal is capable of functioning as a normal person and was able to do so before age 18;
- (5) James O'Neal has not met the minimum threshold standards for demonstrating mental retardation and, thus, is not entitled to an evidentiary hearing on this issue.

Based on the above findings of fact and conclusions of law, the Court hereby denies James O'Neal's first successive petition to vacate or set aside judgment filed pursuant to Atkins v. Virginia<sup>6</sup>

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<sup>6</sup> *supra.*



James O'Neal's request for an evidentiary hearing is denied. Further, all requests for discovery and appointment of experts is hereby denied.

*J. Schweikert*  
Judge Mark Schweikert  
Hamilton County Court of Common Pleas  
**ENTER**  
APR - 7 2004

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